

DOCUMENT 1

In the matter of the Royal Commission into the Robodebt Scheme

No NTG-0203

STATEMENT

Name	Iain Anderson
Address	Address available to the Commission
Occupation	Commonwealth Ombudsman
Date	22 February 2023

1. I refer to the Notice to Give Information in Writing and Produce Documents (NTG-0203) dated 15 February 2023 directed to me by the Royal Commission into the Robodebt Scheme (**Notice**).
2. I currently hold the position of Commonwealth Ombudsman.
3. This statement is true and correct to the best of my knowledge and belief, having made relevant inquiries and examined documents made available to me to prepare this response. I make this statement in response to the Notice.
4. Should further documents or matters be brought to my attention in the course of the Royal Commission, I will seek to assist the Commission including by providing a supplementary response if necessary.
5. This statement has been prepared with the assistance of lawyers from the Australian Government Solicitor (**AGS**).

Q1. Set out your relevant qualifications and professional experience, including the positions held before your appointment as the Commonwealth Ombudsman

6. I hold a Bachelor of Economics and a Bachelor of Laws from the University of Sydney, a Graduate Diploma of Legal Practice from the University of Technology Sydney, a Graduate Management Qualification from the Australian Graduate School of Management and I am an Executive Fellow of the Australia and New Zealand School of Government. I am admitted as a legal practitioner in New South Wales and my name is on the High Court Roll of Practitioners.
7. Before completing my degrees, I worked for periods in junior clerical roles in the Australian Public Service in the Department of Special Minister of State, Department of Community Services and Department of Housing and Construction. After completing my degrees I worked for thirty-two years as a Commonwealth public servant, from 1990-2022.
8. Initially I practiced as a solicitor at the Australian Government Solicitor for over four years, then spent a year as Executive Advisor to the Australian Government Solicitor, then a year as a Departmental Liaison Officer to the Attorney-General. In 1997 I was promoted to the Senior Executive Service in the Australian Government Solicitor (again practising as a solicitor).

9. In 1999 I transferred to the Australian Taxation Office, to set up an in-house legal practice. In 2002 I was promoted to SES Band 2 at the Attorney-General's Department, where until late 2015 I led Divisions with a range of policy and program responsibilities.
10. In 2016 I was promoted to SES Band 3 at AGD, and in 2021 I acted as Secretary of AGD for eight months. In 2022 I was appointed Commonwealth Ombudsman and commenced in that role on 1 August 2022.

Q2. Outline your view of the role and functions of the Office of the Commonwealth Ombudsman, and the value of the Commonwealth Ombudsman as an accountability mechanism in relation to Commonwealth policies and program delivery.

Ombudsman functions

11. The Commonwealth Ombudsman has a number of statutory roles. Under the *Ombudsman Act 1976 (Ombudsman Act)* I am the Commonwealth Ombudsman, Immigration Ombudsman, Law Enforcement Ombudsman, Defence Force Ombudsman, Postal Industry Ombudsman, Overseas Student Ombudsman, Private Health Insurance Ombudsman and Vocational Education and Training Student Loans Ombudsman. Under the *Ombudsman Act 1989 (ACT)*, the Commonwealth Ombudsman is also the ACT Ombudsman unless the ACT Government chooses to specifically appoint an ACT Ombudsman.
12. The function of the Ombudsman under each of the above roles is to investigate complaints about government administration and to perform such other functions as are conferred by Acts or Regulations.
13. In addition, the *Telecommunications (Interception and Access) Act 1979*, the *Surveillance Devices Act 2004*, the *Crimes Act 1914* and the *Telecommunications Act 1997* bestow specific oversight functions on the Ombudsman with respect to the exercise of covert and intrusive powers by law enforcement. The *Australian Federal Police Act 1979* bestows an oversight function with respect to the handling of complaints about AFP conduct and practices.
14. Under the *Public Interest Disclosure Act 2013* the Ombudsman has a range of functions in relation to the Commonwealth Public Interest Disclosure scheme.
15. Under section 4860 of the *Migration Act 1958* the Ombudsman is required to give the Immigration Minister assessments of the appropriateness of the arrangements for the detention of individuals who have been in immigration detention for longer than two years.
16. Under the *Ombudsman Regulations 2017*, the Ombudsman is also the National Preventive Mechanism under the Optional Protocol to the Convention Against Torture for places under the control of the Commonwealth where people may be detained, and the coordinator of the network of National Protective Mechanisms in Australia.

The primary function: independent and impartial grievance body

17. Notwithstanding the range of roles set out above, in my view the primary function of the Ombudsman is to be an independent and impartial entity able to receive and consider grievances that people have with respect to matters of Commonwealth government administration. The

function of receiving and considering grievances is intended to be an accessible and relatively informal part of the Commonwealth administrative law scheme, as opposed to formal merits review by a federal tribunal or judicial review by a federal court. Receiving and considering complaints enables individuals to have their concerns heard. It can also provide assurance to the broader community and parliament that agencies are being appropriately held to account and are acting fairly and reasonably, including to resolve issues.

18. The other statutory oversight functions of the Ombudsman also provide assurance to the community and to parliament that agencies are properly exercising their powers and provide transparency about that, including through the publication and/or tabling of regular reports.
19. Complaint investigation is confidential and is conducted in such manner as the Ombudsman see fit, under section 8(2) of the Ombudsman Act, but the Ombudsman has the power under section 35A of the Ombudsman Act to disclose information publicly if the Ombudsman believes it is in the public interest to do so.
20. The breadth of the Ombudsman's jurisdiction and the volume of complaints - approximately 25,000-35,000 per year - entails that the Ombudsman makes discretionary decisions as to which complaints to investigate and to what extent. Section 6 of the Ombudsman Act gives the Ombudsman the discretion not to investigate a matter, for example if the person making the complaint has not first complained to the relevant department, if the complaint is frivolous or not made in good faith, or if an investigation is not warranted having regard to all of the circumstances. At the same time, some matters will require deeper and more extensive investigation. The outcome of an investigation could be formal or informal action by the Ombudsman, depending on the nature of the issue, the remedy that is believed to be appropriate and the manner in which the agency involved is engaging.

The Ombudsman makes recommendations, rather than directing actions

21. While the Ombudsman has powers to compel the provision of information and documents in order to be able to investigate the matters complained about and is able to make recommendations, suggestions and comments about the resolution of the issues, the Ombudsman does not have the power to direct an action or outcome nor compel an agency to act on a recommendation. This means that an Ombudsman typically seeks to persuade an agency of the merits of the Ombudsman's views and recommendations and may use both formal and informal means to seek to do so.
22. One formal option is to make comments or suggestions arising out of an investigation to a person or entity under section 12(4) of the Ombudsman Act. Section 12(4) provides however that this option is not available if the Ombudsman has already provided that person or entity with a report under section 15 in respect of the same matter.
23. The recommendations made by the Ombudsman have the potential to lead to significant and systemic improvement in government administration, in addition to the resolution of an individual complaint or of a cohort of complaints. Most recommendations made by the Ombudsman are accepted and implemented by agencies.

24. At the same time, in most matters investigated by the Ombudsman the outcome of an investigation is not public, including any individual or systemic responses by the agency involved.

Section 15 and Own Motion Investigations

25. Section 15 reports generally result from the most significant investigations, which are referred to as Own Motion Investigations. However, an Own Motion Investigation is not a precondition of a section 15 report and a section 15 report can be issued at any time the Ombudsman believes the statutory tests in section 15 are met.
26. Section 15 has a significant threshold - for example that a matter appears to have been contrary to law, unreasonable, unjust, oppressive or improperly discriminatory, was based on a mistake of law or fact, or was otherwise wrong in all of the circumstances, and that action should be taken as a result. The action the Ombudsman recommends be taken may be to vary, cancel or mitigate the effects of a decision, but the Ombudsman can also recommend changing a rule of law, provision of an enactment or practice. The Ombudsman can also request that the agency involved advise, within a specified time, the action it proposes to take on the matters raised in the report.
27. One precondition for the issue by the Ombudsman of any report in respect of an investigation where the report sets out opinions expressly or impliedly critical of an agency or person (including a section 15 report) is that, before completing the investigation, the agency or person must be afforded the opportunity to make such submissions, orally or in writing, concerning the matter as they think fit (section 8(5)).
28. A second precondition for issuing a section 15 report is that the agency involved is given the opportunity to provide such comments concerning the report as it wishes to make (section 15(5)). These responses are typically published as attachments to the report.
29. The full process of an Own Motion Investigation may take an extended period to complete, for example 12 months from the start of the investigation to the publication of a report. An Ombudsman may also decide to complete an Own Motion Investigation in a much shorter timeframe, for example due to the circumstances of the issue. There will typically be a range of finely balanced decisions to be made by the Office at the outset and in the course of the investigation, in order to be able to bring it to finalisation within the desired timeframe.
30. The power to issue a section 15 report is a non-delegable power of the Ombudsman, who must weigh up the issues, the evidence, proposed findings and the best way to take those matters forward. While an Own Motion Investigation team carries out the investigation and drafts the report, it is a report of the Ombudsman and the recommendations, the content and the decision to publish are all ultimately decisions of the Ombudsman.

Section 15 reports are usually published

31. A formal report under section 15 of the Ombudsman Act is generally also published. If it is believed that there are grounds to invoke section 15, it is usual to also decide that publishing the report is in the public interest, under section 35A of the Ombudsman Act.

32. A section 15 report must in any case be provided to the Minister responsible for the agency involved. The Ombudsman may also choose to discuss any matter relevant to the investigation with the responsible Minister, whether before or after the completion of the investigation (section 8(8)):
33. Alternatively, the Ombudsman could choose to publicise the issue through an issues paper or other generalised publication, or could choose to deal with the matter confidentially in a formal or informal manner.
34. Dealing with a matter confidentially could include issuing a formal section 15 report but not publishing it, although this would be unusual.
35. A section 15 report carries with it the power to make recommendations and to follow up the implementation of those recommendations. If a section 15 report has been made and an agency does not take adequate and appropriate action on the Ombudsman's recommendations within a reasonable time after provision of the section 15 report, the Ombudsman Act provides options of advising the Prime Minister (section 16) and the Presiding Officers of Parliament (section 17) of the matter. In the case of the Presiding Officers, the Ombudsman Act provides that they should present to both Houses of Parliament copies of the section 15 report in question.
36. If an Ombudsman chooses to address an issue informally, for example by engaging with an agency or agency head, making suggestions to them and seeking assurances from them that appropriate action will be taken on an issue, the Ombudsman can still subsequently choose to take formal action - such as at that point issuing and publishing a section 15 report, with formal recommendations - if for example the agency does not in fact take the action it had committed to take.

Q3, Having reviewed the evidence presented at the Royal Commission to date in relation to investigations undertaken by the Commonwealth Ombudsman, please provide your views on:

(a) the processes which the Office of the Ombudsman currently follows to undertake an Own Motion Investigation, and whether those processes are similar or different to the processes which appear from the evidence to have occurred in relation to the Investigations; and

(b) the manner in which an Own Motion Investigation report is prepared and finalised, including the manner in which agencies are provided with an opportunity to comment on a draft report, and whether these are similar or different to the techniques which appear from the evidence to have occurred in relation to the Investigations

37. The processes currently followed by the Office of the Ombudsman in conducting an Own Motion Investigation appear to be similar to the processes followed in relation to Robodebt, or the Online Compliance Intervention (OCI) scheme.
38. At the same time, my understanding is that the Robodebt investigations may have been significantly more challenging than most investigations the Office conducts, particularly in terms of how the agencies responded to requests for information and engaged with the Office during

the process. I say that based on what I have observed of the evidence that the Commission has heard and upon discussions with staff who have conducted other Own Motion Investigations.

39. It appears, for example, that requests for documents were not always met, or were answered with cut and pastes or summaries of documents (such as legal advice) rather than the underlying documents actually requested. The departments seem also to have pursued a somewhat strained interpretation of the clear and straightforward requests for information in deciding what was in scope. Neither of those is usual in my experience. In addition, the impression I formed of the evidence that the Commission has heard is that the agencies were very firmly advocating a particular position in their engagement with the Ombudsman, rather than simply responding to the requests and questions they received from the Ombudsman. In my experience, while it is not uncommon for an agency to put its point of view to the Office in the course of an investigation, it is unusual to do so with the apparent level of vigour and persistence that the agencies did in this case, including in how the agencies seem to have sought to shape every engagement they had with the Office as a way to push their particular view.
40. In addition, while as I have said earlier the timeframe set for an Own Motion Investigation will depend in part upon the circumstances of the issue, it seems to me that the 2017 investigation and report were completed in a very short timeframe for a report on such a major issue. It is possible that a factor which influenced the decision on timeframe, in terms of perceived urgency of the issue, was the volume of complaints that the Office was receiving about Robodebt, but I do not know why this timeframe was set for the investigation and report.
41. I note that the evidence before the Royal Commission has touched on the following processes for engaging with agencies:
 - a) requesting copies of documents
 - b) meeting with agencies to discuss the issues relevant to the report
 - c) providing the agency with preliminary drafts of a report, and the agencies providing feedback on the draft including by way of track changes
 - d) providing the agency a formal opportunity to comment on a proposed report, and annexing their formal comments to the report.
42. Each of these are techniques which the Office continues to use. Each of these is either a useful or mandatory step in the process of conducting a complex investigation and preparing a section 15 report. At the same time, the Office needs to be ready and able to quickly change its approach if necessary in the course of a particular investigation, for example if an agency is not responding appropriately to requests for documents. In such situations it may be a question of taking informal or formal steps to seek agency compliance, if it appears that the agency has omitted to provide documents that had been specifically requested.
43. It may also be a matter of ensuring that the agency understands what the Office is seeking from them and why. For example, in relation to paragraph 41(c) above, providing an agency with a draft of a report can be an efficient and effective way for an agency to assist the Office to better understand or more accurately express matters of fact which are better known by the agency, particularly if the draft report is lengthy and the issues are detailed or involve technical language

and concepts. It needs to be understood by the agency, however, that the Office is just seeking to identify errors of fact in the draft and that the final wording of the report is a matter solely for the Ombudsman. I say more about this in paragraphs 54-55 below.

Q4. Please provide copies of any process guidance documents which would have been available to Commonwealth Ombudsman staff between December 2016 and the present date that provided guidance in conducting an Own Motion Investigation.

44. Although an investigation is to be undertaken in such manner as the Ombudsman thinks fit (section 8(2)), there was and is procedural guidance available to staff conducting investigations, including Own Motion Investigations, preparing section 15 reports and monitoring the implementation of recommendations.
45. I have caused staff in the office to undertake a search for documents that would match the terms of question 4 above. I have supplied these to AGS to make available to the Commission. They are:
- a) Work Practices Manual (2011-2019)¹
 - b) Guidelines for preparing own motion and major investigation reports for publication (2013-2019)²
 - c) Formal Report Checklist (2013-2019)³
 - d) Formal Report Template (2016, regularly updated for branding purposes)⁴
 - e) Parliamentary Complaint Handling Procedure 13 – Formal Reports (2019-current)⁵
 - f) Systemic Issues Assessment Framework (2020-current)⁶
 - g) Fact Sheet for Agencies on Ombudsman Recommendations (2020-current)⁷
 - h) Monitoring Recommendations Policy (2021-current)⁸
 - i) Monitoring Recommendations Procedure (2021-current)⁹
 - j) Crafting Recommendations Guidelines (2021-current)¹⁰
 - k) Fact Sheet for Agencies on Own Motion Investigations (2021-current)¹¹

¹ IAN.001.001.0082

² IAN.001.001.0020

³ IAN.001.001.0232

⁴ IAN.001.001.0252

⁵ IAN.001.001.0002

⁶ IAN.001.001.0057

⁷ IAN.001.001.0080

⁸ IAN.001.001.0050

⁹ IAN.001.001.0058

¹⁰ TBA

¹¹ IAN.001.001.0233

- l) Ombudsman Act 1976 Own Motion Investigations Introduction Training (2022-current)¹²
- m) Assessment Frameworks and Information Gathering – Strategy Investigations Team Training (2022-current)¹³
- n) Poster for Agencies on Double Smart Recommendations (2021-current)¹⁴
- o) Crafting Recommendations Training (2022-current)¹⁵

Q5. Outline any changes that you suggest should be made, with respect to the current approach, processes or procedures that the Commonwealth Ombudsman follows, in light of your review of the evidence before the Royal Commission.

Work is underway on procedural guidance

- 46. My Office is currently updating the guidance material specifically in relation to Own Motion Investigations.
- 47. The key aspects of the guidance that I believe need to be updated cover matters like:
 - a) the manner in which we scope the investigation at the outset;
 - b) the manner in which we request information from agencies, including legal advice, and our options if we think the agency is not providing the information that has been requested;
 - c) how we provide procedural fairness before finalising an investigation;
 - d) how to address and resolve issues;
 - e) how to address issues that we cannot resolve.
- 48. I believe that it is desirable to provide guidance on the manner in which we scope out an investigation at the outset because I believe that ensuring there is clarity on the purpose for and potential key issues in an investigation will assist in making tactical decisions in the course of an investigation. It will also assist in planning the time and processes required to conduct the investigation, and in ensuring that a section 15 report addresses the key reasons why the investigation was embarked upon.
- 49. I believe that addressing the manner in which we request information from agencies and our options if we do not think an agency is responding appropriately is also important in guiding tactical decision-making during the investigation, should an issue arise. For example, while we typically commence an investigation by notifying the relevant agency and seeking the provision of information and documents under section 8 of the Ombudsman Act, we also have the option

¹² IAN.001.001.0028

¹³ IAN.001.001.0235

¹⁴ IAN.001.001.0001

¹⁵ IAN.001.001.0256

of formally requiring the provision of information and documents by issuing a notice under section 9 of the Ombudsman Act. If a person does not comply with a section 9 notice, we can apply to the Federal Court for an order directing the person to comply.

50. This latter step would not be taken lightly, given it will involve delay to an investigation. However, it is important that the investigation team know that it is an option and that they – and the Ombudsman – are able to draw this to the attention of an agency, or their Minister, as an option that we are willing to pursue if necessary. (Section 8(7A)(b) provides that a pre-condition for the issue of a section 9 notice is notification to the Minister that the matter is being investigated, unless the Minister has already been advised.)
51. Another option is to make and publish formal recommendations about the conduct of the agency in a section 15 report, which could be done as a separate stand-alone exercise during the investigation, specifically about the agency's apparent failure to comply with legal obligations under sections 8 or 9 of the Ombudsman Act. Before embarking upon this option, it would first be drawn to the attention of the head of the agency as an action being seriously contemplated.
52. Alternately, if an agency has not fully complied with section 8 but the Office has been able to obtain sufficient information to form a view upon the key issues involved in the investigation, the agency's response to requests for information could be the subject of comment in the final section 15 report at the conclusion of the investigation. While the Ombudsman may not be able to compel an agency to take a particular action, a potentially significant tool at the Ombudsman's disposal is the ability to comment publicly on a matter and on an agency's conduct, should the Ombudsman believe that it is necessary to do so.
53. With respect to seeking legal advice from agencies, the procedural guidance will make clear that we should be seeking copies of requests for legal advice, documents referring to requesting legal advice, drafts of legal advice, legal advice, and all documents discussing or analysing legal advice. When we are seeking information and documents, we also need to make clear that we require copies of the actual documents.
54. In terms of guidance on procedural fairness process, I believe that we should ensure that we do not through this process impair our own ultimate effectiveness. Given that the Ombudsman cannot compel an agency to act on recommendations, as noted above, we seek to persuade agencies of the merits of our views and, where possible, to work together constructively to seek an appropriate outcome on an issue. This may include accepting textual suggestions if in the view of the Ombudsman they do not have an inappropriate detrimental effect upon the intent of the report, in particular the way in which it sets out evidence, findings and recommendations.
55. It is also important that agencies are properly provided with the opportunity to identify what they believe to be errors of fact or law. At the same time, it can be challenging for an investigation team if an agency is strongly urging changes to text on the grounds that it is incorrect or fails to include relevant detail, but in the team's view it is actually just a subjective difference of opinion about language. The guidance should therefore make clear that the process of procedural fairness is limited to enabling agencies to make submissions on the matters being investigated, that ultimately the report is a statement of the opinion of the Ombudsman, and also note that agencies will get an opportunity to respond formally when a section 15 report has been finalised.

Future options for addressing and resolving issues

56. In terms of how to address and resolve issues and how to address issues that we cannot resolve, I make some further comments in the following paragraphs.
57. Overall, in my view guidance is useful in assisting staff, but it only goes so far: for example, it cannot anticipate all issues that may arise in the course of a particular investigation.
58. While I am keen that the Office provides some more detail in our guidance on matters such as those mentioned in paragraph 45 above, that does not mean that in my view the guidance available in 2016 was defective. I also do not intend to be critical of the investigators or of my predecessors as Ombudsman: they were required to make the best decisions they could in the challenging circumstances prevailing at the time.
59. The team conducting the 2016-17 investigation were able to identify a range of significant issues, to persist in seeking information when it was not provided, and to propose ways of addressing issues, notwithstanding a range of significant challenges experienced during the conduct of the investigation.
60. Legality was identified as a critical issue in the investigation. My understanding is that ultimately the view was reached that the Office was not able to determine the question of legality and that it should not be raised in the report as an issue if it was not something the Office was able to conclusively determine. I believe that it was also understood that the question of legality would soon be considered by the Administrative Appeals Tribunal in applications seeking review of decisions made under the OCI scheme.

Option: seeking external legal advice

61. My understanding is that consideration was given within the Ombudsman's Office to seeking external legal advice. I am not sure who made the decision not to proceed with this. Consideration was also given to seeking an advisory opinion from the Administrative Appeals Tribunal, under section 10A of the Ombudsman Act. Inquiries were made with the AAT, which indicated it would require a full contested hearing. I understand that this was seen as taking too long and being too resource-intensive.
62. I am keen that the Office's revised guidance material makes clear to staff some of the formal and informal options and powers we have, and also that I am willing, if necessary, to consider pursuing them when conducting particularly challenging investigations. Beyond updating the guidance material, however, this is something I need to ensure is and continues to be clearly understood by all staff of the Office, as part of ensuring that our role is clearly understood and advanced in everything we do.
63. For example, in my view, should a question of legality that we are unable to determine arise in a future investigation, one option would be for us to seek external legal advice. The Office would need to comply with the *Legal Services Directions 2017* in doing so. The Legal Services Directions are binding rules issued by the Attorney-General about Commonwealth legal work. The Directions would require the Office to consult with the agency that administers the relevant legislation we were seeking advice upon before we seek the advice, unless the matter is urgent, and to provide a copy of the advice to the agency. It would also be open to me to seek an

exemption from the Directions from the Attorney-General, but I do not see the requirements of the Directions as a problem.

64. In my view, a preferable alternative would be to tell the agency that it should seek external legal advice and then provide a copy to my Office. Advice could be sought from the Australian Government Solicitor, who have considerable expertise in the interpretation of Commonwealth statutes, or in the most significant cases from the Solicitor-General, noting that under the Legal Services Directions the Attorney-General needs to approve the provision of advice by the Solicitor-General. If the agency declined to seek external legal advice, options would then be to ourselves seek external legal advice, or to issue a section 15 report formally recommending that the agency seek external legal advice within a specified timeframe on a specified question or questions and then share that advice with the Office. The option of seeking to have the agency procure external legal advice may take longer than seeking external legal advice ourselves, but in my view is preferable in terms of seeking to improve government administration because it involves the relevant agency agreeing to take the desired action to clarify the issue.

Option: AAT advisory opinion or Federal Court test case

65. Another option would be to seek an advisory opinion from the AAT. In my experience, a fully contested hearing on a narrow question of law can be prepared for and conducted in a very focused manner, and it would primarily be a question of when the AAT could make available an appropriate member – ideally a Deputy President who is also a Federal Court judge – to conduct a hearing and then when a decision could be rendered.
66. It would be unusual for the Ombudsman to be a party to a matter before the AAT, with the other party being the relevant agency (which is how I understand the AAT had envisaged the process would occur when the suggestion was made in 2017), given that the Ombudsman is required to be impartial. At the same time, I do not believe that impartiality would prevent the Ombudsman from advancing a view to the AAT as to the correct interpretation of the law, in order to have the AAT then advise on the question.
67. In my view, however, a preferable option would be to seek to persuade the agency, including by formal recommendation in a section 15 report, that the relevant agency fund an applicant to bring a test case in the Federal Court. Under section 45 of the *Administrative Appeals Tribunal Act 1975* the President of the AAT, on his or her own motion or on the application of a party, may refer a question of law arising in a proceeding before the Tribunal to the Federal Court for determination.
68. While the government has announced that it intends to abolish and replace the AAT, my Office is recommending to the Attorney-General's Department that the successor body to the AAT should similarly be able to provide an advisory opinion on a matter referred by the Ombudsman and also to refer a question of law to the Federal Court for determination. These are examples of how different elements of the Commonwealth administrative law scheme can work together to resolve issues of significance to the community.

Option: report on a doubt without resolving it

69. Another option available to the Office, if there is a significant contested issue that the Office is unable to determine, is to nonetheless clearly articulate the issue in a section 15 report. Agencies

may suggest that it would be unhelpful to create public doubt about issues such as the legality of a program, if the Ombudsman is unable to determine categorically that the program is or is not legal. In my view, however, we are not providing assurance about government administration if we are silent on issues that we believe to be significant and have chosen to investigate, even if we are not able to determine them.

70. The benefit of reporting on a significant matter that the Ombudsman has investigated but not been able to determine is that it can encourage the agency to prioritise resolution of the doubt and to transparently report the outcome of their analysis. In my view, that would be in the interests of public administration.
71. I also do not believe that the Ombudsman expressing an opinion in a report would necessarily create any prejudice to the subsequent consideration of that matter in a civil tribunal or court, noting that tribunals and courts will determine matters before them in accordance with their own professional and statutory obligations.
72. I do recognise there would be a range of considerations to weigh up, for example:
 - a) expressing the report in a way that did not prejudice the Commonwealth's legal professional privilege in any advice that had been shared with the Ombudsman
 - b) the risk that the Ombudsman would be drawn into litigation in a way that undermined the independence of the Office, for example a party seeking to rely on an expression of a view by the Ombudsman as supporting their case, to apply pressure to a Commonwealth party to concede a point. I note that the Ombudsman and the staff of the Office can not be compelled to appear in court and disclose information obtained under the Ombudsman Act (section 35(8)), so the risk of the Office being drawn more directly into the litigation is remote
 - c) the risk of an allegation of contempt of legal proceedings if the Ombudsman were to publish a view on a legal issue before a court or tribunal and thereby interfere with the conduct of the proceeding. That risk also strikes me as remote, although in a criminal or jury trial particular care might need to be exercised.
73. However, I do not consider these to be insurmountable obstacles. If I was considering publishing a report expressing a doubt about legality at a time when I knew proceedings were pending, I would seek legal advice on whether the report could prejudice proceedings, and seek a way to include something in my report that was not likely to cause prejudice.
74. Where the issue unable to be resolved is a matter of legality, in my view the most desirable option is either a test case or a legislative amendment to publicly put the matter beyond doubt, or at least the seeking of external legal advice.

Q6. Outline any changes you would recommend in respect of the current processes of engagement by the Commonwealth Ombudsman with any departments or agencies that are the subject of an investigation, in light of your review of the evidence before the Royal Commission.

75. I have outlined in response to question 5 a range of suggestions which would impact on the current process of engagement. As I have noted above, in my view it is a question of seeking to persuade an agency if possible, and if not to consider what formal options are available to the Ombudsman to ensure that one's view is clearly articulated and considered, publicly if necessary, in order to advance improvement in government administration. We have adopted a model of risk-based oversight with respect to law enforcement agency use of coercive and intrusive powers, and I will consider whether assessments of agency capability and culture should form part of the scoping of and preparation for complex investigations and other work of the office. I have no further changes to recommend. However I welcome the Royal Commission's consideration of these issues. I will carefully consider any recommendations the Royal Commission may make in relation to the functions which the Ombudsman performs.

Signature of witness:



Name of witness:

IAIN HUGH CAIRNS ANDERSON